

THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

UNITED STATES, in its own right and
on behalf of the Lummi Nation,

Plaintiff,

LUMMI NATION,

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, et al.,

Defendants.

NO. C01-0047Z

**JOINT MOTION TO ADOPT
SPECIAL PROCESS FOR
CONSIDERATION OF
SETTLEMENT**

**NOTE ON MOTION CALENDAR:
NOVEMBER 13, 2006**

Come now the United States, the Lummi Nation, the Washington State Department of Ecology ("Ecology"), Whatcom County, the Georgia Manor, Sunset and Harnden Island View Water Associations, and the numerous individual Defendants represented by attorney Gene Knapp (collectively, the "Settling Parties") and move the Court for an order establishing a process for consideration of the Settlement Agreement and proposed Judgment and Order negotiated by the Settling Parties. This Process

**JOINT MOTION TO ADOPT
SPECIAL PROCESS**

Page 1

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1 Motion is a motion for relief from the deadline imposed by rule pursuant to Local Rule
2 7(5)(d)(2)(A), and is based upon the following considerations.

3 The Settling Parties have negotiated, executed, and filed with the Court for
4 approval a detailed Settlement Agreement (the "Settlement") that divides the ground
5 water at issue in this case between the Plaintiffs and Ecology, and provides for a joint,
6 agreed regulatory structure for future ground water use within the Case Area. Under the
7 Settlement, Ecology is responsible for further dividing its allocation among present and
8 potential future users of ground water who claim water under state law.

9 The Joint Motion to Approve Settlement and Enter Proposed Judgment and
10 Order, ("Approval Motion"), has been filed with the Court, served on all parties who
11 have appeared in this proceeding, and noted for consideration by the Court on November
12 24, 2006. In accordance with local Fed.R.Civ.P. 7(d)(3), opposition to the motion would
13 be due November 20, 2006 and replies would be due three days later, the day before the
14 consideration date. Given the nature of the Settlement and the fact that many defendants
15 in this action are not represented by counsel, the Settling Parties anticipate that if
16 opposition to the motion is filed, the opposition may be wide-ranging both in form and
17 content. The usual timing requirements of the local rules may not accommodate such
18 opposition efficiently, leading to a waste of judicial resources. Consequently, based on
19 their experience in other water rights cases, the Settling Parties ask the Court to alter the
20 operation of the usual rules and substitute the following procedure:

21 1. Within 10 days after the entry of the order adopting the process for
22 consideration of the Settlement ("Process Order"), the United States shall mail a copy of
23

24 **JOINT MOTION TO ADOPT
SPECIAL PROCESS**

25 Page 2

U.S. Department of Justice
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1 the following documents to all defendants in the action who have not entered an
2 appearance or been dismissed, at their last known mailing address: (1) the proposed
3 Settlement; (2) the proposed Judgment and Order; (3) the Approval Motion; and (4) the
4 Process Order (the proposed Process Order is attached hereto, with the Notice of
5 Proposed Settlement attached to the proposed Process Order as Exhibit A);.

6 2. The United States shall publish the Notice of Proposed Settlement for two
7 consecutive weeks in a newspaper of general circulation in Whatcom County. The first
8 publication shall occur within 10 days of entry of the Process Order.

9 3.A. Any defendant opposing approval of the Settlement and/or entry of the
10 proposed Judgment and Order shall file a written objection with the Court on or before
11 December 15, 2006 at the address listed in paragraph 9 below. Such defendant shall
12 also mail a copy of such objection to counsel of record for the Settling Parties at the
13 addresses listed in paragraph 10 below. Such objection must include:

14 (1) the name and mailing address of the objector;

15 (2) a description of the water right asserted in objector's claim, including
16 the location and tax parcel number of the land on which the water has
17 been used, the amount of water so used, and the date on which the water
18 was first put to use;

19 (3) an explanation as to why the proposed Settlement and/or proposed
20 Judgment and Order would impair the alleged water rights of the objector
21 or other legally protected interest; and
22

23 **JOINT MOTION TO ADOPT**
24 **SPECIAL PROCESS**

25 Page 3

U.S. Department of Justice
James B. Cooney
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Washington, DC 20004
(202) 514-5406

(4) a list of any witnesses and exhibits that the objector intends to present at any hearing on the objection.

B. The objector shall also mail to counsel for the Settling Parties a copy of each exhibit the objector intends to present in support of their objection, and a detailed summary of the testimony the objector expects the witnesses to give at hearing, including the objector's own testimony if the objector intends to be a witness. The objector shall not file copies of these documents with the Court at this time.

C. Objectors shall have the opportunity, during regular business hours, to review and copy all documents produced in discovery in this litigation, at the offices of Raas, Johnsen, & Stuen, P.S., Attorneys at Law, 1503 E Street, Bellingham, Washington, 98225. Any additional discovery of a responding party shall be permitted only with leave of the Court.

4.A. Any party to the Settlement Agreement may file a response to each objection within 45 days after the objection has been filed with the Court. The responding party may make discovery of the objector regarding the objection. The response must include:

(1) any motion for summary disposition of the objection; and

(2) a list of any witnesses and exhibits that the responding party to the Settlement Agreement intends to present at any hearing on the objection.

B. The responding party shall also mail to the objector or the objector's counsel a copy of each exhibit the responding party intends to present in support of the response, and a detailed summary of the testimony the responding party expects the

**JOINT MOTION TO ADOPT
SPECIAL PROCESS**

Page 4

U.S. Department of Justice
James B. Cooney
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1 witnesses to give in support of the response, including the responding party's own
2 testimony if the responding party intends to be a witness.

3 5.A. If any motions for summary disposition are filed by a party to the
4 Settlement Agreement in connection with any objections, a response to such motion for
5 summary disposition, including any declarations or exhibits, shall be filed by the
6 applicable objector(s) within 30 days after the motion for summary disposition has been
7 filed with the Court.

8 B. Replies shall be filed by those moving for summary disposition within 20
9 days after the responses have been filed. Unless otherwise directed by the Court, no
10 hearings will be conducted regarding motions for summary disposition. The Court, after
11 considering the motion, response, and reply, shall issue decisions on each motion for
12 summary disposition.

13 6. As to objections to which no motion for summary disposition has been filed,
14 or to which a motion for summary disposition was filed and the Court concludes that a
15 hearing is necessary, the Court shall conduct expedited hearings on such objections.
16 These hearings, and the hearing on the Approval Motion, will take place on or about
17 April 2, 2007. The Court at a later date will inform the applicable parties of the exact
18 date and time of each objection hearing. The objector and parties responding to such
19 objection shall have the opportunity at such hearings to present witnesses and introduce
20 evidence.

21 7. Upon completion of all hearings, if any, on objections, and the hearing on
22 the Approval Motion, the Court shall enter a decision either (a) approving the Settlement
23

24 **JOINT MOTION TO ADOPT**
SPECIAL PROCESS
25 Page 5

U.S. Department of Justice
James B. Cooney
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1 and entering the proposed Judgment and Order or (b) disapproving the Settlement and
2 declining to enter the proposed Judgment and Order.

3 8. The Court shall approve the Settlement and enter the proposed Judgment
4 and Order if, after considering any admissible evidence presented, it determines that the
5 parties to the Settlement have established by a preponderance of the evidence that:

6 a. The Settlement is fair, adequate, and reasonable, considering all of the
7 circumstances surrounding the settlement; and

8 b. The water rights or other legally protected interest claimed by the objector(s)
9 were:

10 (i) not established by the objector; or

11 ii) if established, the objector's water rights or other legally protected
12 interest would not be materially injured by the terms of the Settlement and
13 proposed Judgment and Order; or the objector is bound by the Settlement
14 terms by virtue of the objector's relationship to a party that has agreed to
15 the terms of the Settlement.

16 9. The mailing address of the Court clerk is: United States District Court, 700
17 Stewart Street, Seattle, WA, 98101.

18 10. The mailing addresses of counsel for the Settling Parties are:

19 James B. Cooney
20 Attorney for United States of America
21 601 D Street N.W., Room 3017
22 Washington, D.C. 20004

1 Harry L. Johnsen,
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24 Attorney for Whatcom County
25 311 Grand Avenue
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The above procedure is consistent with the process adopted in several Indian water rights cases. See In Re The General Adjudication of All Rights to Use Water in the Little Colorado River System and Source, No. WC-79-0006 (Administrative Order issued by Arizona Supreme Court).¹

¹/A copy of the Little Colorado River Administrative Order is attached for this Court's reference.

**JOINT MOTION TO ADOPT
SPECIAL PROCESS**

Page 7

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Respectfully submitted this 2nd day of November, 2006.

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**JOINT MOTION TO ADOPT
SPECIAL PROCESS**

Page 8

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